Rethinking "Bias and the Bar":
The American Bar Association's Evaluation of Federal Judicial Nominees

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Abstract

The paper explores the factors behind the American Bar Association's (ABA) ratings of federal judicial nominees, with special attention to the role of political ideology. The ABA, through its Standing Committee on the Federal Judiciary, has traditionally been included in the pre-selection process of evaluating individuals for nomination to federal judgeships. Recently, the George W. Bush administration removed the ABA from its traditional role in the pre-selection process, citing concerns of a bias against conservative nominees in the ratings process. A recent piece by Vining et al. titled, "Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees," empirically examines the possibility of a bias in ABA ratings. While this piece represents an admirable foray into an area of scholarship left largely untouched in recent decades, a number of oversights in key areas limit its overall effectiveness. Thus, this project replicates the aims of the Vining piece utilizing more valid metrics. The paper considers all federal judicial appointees from the first term of President Reagan through the second term of President Clinton. Measures of association are used to evaluate the relationship between a number of variables and ABA ratings. The results of the analysis suggest that, contrary to the conclusions in Vining et al., the primary factors in ABA ratings success are not political but professional and demographic. Furthermore, a qualitative analysis of selection in the modern reveals distinct approaches on the part of Republican and Democratic presidents that can explain the appearance of any bias.

I. Introduction

The latter half of the twentieth century in federal politics brought with it a greater emphasis on the importance of the federal judiciary that has persisted into the current political reality. Once the domain for repaying political favors, the federal bench is now regarded as an essential tool for implementing policy and as a means for a president to cement his legacy long after he leaves office.

Recent events in selection politics have highlighted one particular component of the selection process: the involvement of the American Bar Association in the evaluation and rating of potential judicial nominees. Having been a part of the pre-selection stage dating back to the Eisenhower Administration, the ABA's role in judicial selection has often been overlooked by both academic scholarship and the popular media. George W. Bush's decision to remove the ABA from its traditional role in 2001, however, reintroduced the organization to the political conversation. In a much-publicized move, President Bush cut the ABA out of the pre-selection process over concern of a bias in its ratings against conservative nominees. This charge was ironic, given that the organization had long been seen as a conservative body itself. While President Obama has since restored the ABA to its former role, conflicting opinions of the organization's neutrality linger.

With organizations like the Federalist Society, People for the American Way, and the Alliance for Justice more interested and involved in the politics of judicial selection than ever, the issue is not likely to go away in the foreseeable future. To that end, this paper presents a comprehensive empirical analysis of the trends in the ABA's evaluation and rating of judicial nominees. The aim of the analysis is to discern what criteria the

ABA considers and values when rating judicial nominees, and if these criteria demonstrate a pattern of discrimination against conservative nominees. In pursuing this goal, the paper acknowledges the existing literature that has been written on the subject. One particular piece—"Bias and the Bar," by Richard Vining, Amy Steigerwalt, and Susan Navarro Smelcer—serves as an impetus of sorts for the current analysis. Their piece, the most recent attempt at a comprehensive analysis of the ABA's ratings process, contains a number of interesting findings and conclusions that prompted further investigation into the subject. Thus, the current analysis utilizes the best techniques from this and other pieces and expands the scope of the analysis in order to more fully understand the ABA's evaluations.

Existing Literature

Despite the longevity of its official role in the selection process, scholarship concerning the ABA Standing Committee has been sparse and sporadic. The first real such work was done by Joel Grossman in his seminal 1965 book, *Lawyers and Judges*. Grossman provided recount of the early history of the ABA's involvement in the selection process, as well as an overview of the Committee's rating process. It proved the foundational work in the subject area.

The Committee was left largely uncovered in the literature for nearly two decades, until Elliot Slotnick's "contemporary assessment" in 1983. Slotnick's piece provided an updated outline of the ABA's role and process, with considerable attention devoted to how the organization navigated Carter's creation of selection commissions. The Slotnick study was also distinguished by its inclusion of the first attempt to evaluate quantitatively specific trends in the Committee's ratings of nominees. Slotnick's analysis

found demographic and legal occupational variables to exert the most predictive power on a nominee's ABA rating. Interestingly, Slotnick found no statistical evidence to suggest that political activity or experience influenced ABA ratings (Slotnick 1983, 392).

Slotnick's study was followed by another large gap in the scholarly literature. The subject remained untouched until President Bush's decision to remove the ABA from its traditional role due to claims of a partisan bias sparked renewed interest. A trio of articles appeared following Bush's proclamation, all with the goal of evaluating the trends in the ABA's rating of judicial nominees.

Susan Brodie Haire's study, choosing to avoid the question of bias raised by conservatives in the prelude to Bush's decision, confined itself to evaluating the relationships of judicial experience and demographic variables. Haire's findings echo those of Slotnick some two decades before. In separate studies, however, James Lindgren and John R. Lott, Jr., attempted to answer the question of bias in the ABA's ratings directly.

Lindgren's study launched the opening salvo in the debate over the ABA's neutrality, observing that "a [George H.W.] Bush appointee with good credentials—both private and government practice experience, a top-10 law school education, law review experience, and a federal court clerkship—has a lower probability (32%) of getting the highest ABA rating than a Clinton appointee who has none of these credentials (48%)" (Lindgren 2001, 19).

Lott is much less definitive with his conclusions. While his analysis reveals occasional support for the claim that Clinton's nominees had greater relative success than Bush's, he cautions that the results are not consistently statistically significant. Lott also

writes "something more complicated appears to be happening than simple discrimination against Republicans as a whole" (Lott 2001, 53). His analysis reveals that in some cases, Bush nominees actually performed better than Clinton nominees in ratings success, leading him to conclude that it is "difficult to say for sure that such bias exists, though the evidence does tend to point weakly in that direction" (Ibid.)

This first wave of renewed interest triggered instant scholarly reaction. Responding to Lindgren's study in late 2001, Michael J. Saks and Neil Vidmar offered a stinging critique of Lindgren's methods and findings. The pair argued that a "knowledgeable and disinterested student of empirical social science research would not be able rationally to conclude that the ABA's evaluations were politically biased" based on the evidence presented by Lindgren (Saks and Vidmar 2001, 221). While this review prompted additional academic rejoinders from both sides, the subsequent articles narrowed their focus and contributed little to the substantive discussion over the existence of a bias in the ABA's ratings.

The most recent attempt to tackle this question came in the form of the 2009 paper by Vining, Steigerwalt, and Smelcer. While the paper has yet to appear in print as of this writing, it has been presented as a conference paper at the Midwest Political Science Association and garnered considerable scholarly and media attention (Liptak 2009, *New York Times*). The paper aims to be the most comprehensive evaluation of a possible ABA bias to date. Covering all circuit court nominations from the period 1985-2008, Vining et al. consider what they call "political" and "judicial" explanations for success in ABA ratings. The authors conclude that, all things being equal, "Democratic/liberal nominees are more likely to receive the ABA's highest rating of

'Well Qualified' than Republican nominees" (Vining et al. 2009, 17). This paper, however, features a number of troubling oversights in its theory and execution that challenge the validity of its conclusions. The oversights of the Vining et al. piece, which will be detailed at length in the following section, provide the impetus for this analysis, which attempts to address the inconsistencies of Vining et al. in order to better capture empirically what variables are correlated with success in the ABA's rating of judicial nominees.

Issues in "Bias and the Bar"

While Vining et al.'s piece represents an admirable foray into a neglected area of the scholarly literature, the authors make a number of puzzling decisions in developing their methods and in interpreting their results. Though each concern may, on its own, offer some basis for doubt, the sum total of these criticisms casts a considerable shadow on the authors' conclusion that the ABA is biased in its rating of judicial nominees.

Chief amongst these problems are several decisions related to formulating and conceptualizing the "political" variables of their study. As these measures are most essential to the authors' central question, these missteps are of the highest relevance and greatest significance. Thus, for example, Vining et al. make a theoretically-driven decision to equate the ideology score of the judicial nominee's home-state senators (based on Poole's NOMINATE calculation) with that of the judicial nominee himself. The rationale behind this decision is undoubtedly based in the norm of "senatorial courtesy," which dictates that the president acknowledge and accommodate the views of the senators representing the state in which a given nomination is located. While capturing empirically the ideology of judicial nominees is far from easy, Vining et al.'s

chosen method is not the best proxy. The observance of senatorial courtesy is much reduced in the filling of more-important Courts of Appeals vacancies when compared to filling vacancies in the single state federal District Courts. As circuit courts span multiple states each, all relevant senators conceivably would have to be consulted for a vacancy to the Courts of Appeals. As Vining et al. only consider circuit court nominations, their decision to lend more weight to the home-state senators' scores over that of the nominating president is theoretically questionable at best.

Even more problematic is the authors' use of past experience as a congressional staffer as a proxy for partisan activism. They theorize that a nominee's likely success in achieving the highest ABA rating decreases the more years he works as a congressional staffer because such work indicates a high degree of partisanship in a judicial nominee. While this assertion may be true, its focus is so narrow as to render its explanatory power highly questionable. While congressional staffer may, indeed, be viewed as a highly partisan position, there are numerous other easily measured governmental and party positions that serve as roughly equivalent or considerably stronger indicators of partisan activism. Experience as an elected official or political candidate, service as a Justice Department official (especially U.S. attorneys), or service as a party official are just a few examples of positions that would, arguably, be at least as indicative of partisan activism as years working as a congressional staffer. However, in Vining et al., years as a congressional staffer is used to the complete exclusion of all other types of partisan political experience. Beyond my conceptual reservations, Vining et al.'s use of the variable raises concerns due to the small number of cases. Vining et al.'s data set features 317 observations for the entire period 1985-2008. The number of nominees in

the sample who had experience as a congressional staffer would seem, intuitively, to be quite small. Unfortunately, Vining et al. do not provide the number of cases that exhibit the variable they place so much stock in as a measure of partisan activity.

An additional methodological concern is the way in which the authors count their observations. The authors count all nominations made during each congressional term, meaning that a nominee nominated by successive presidents or during successive terms is counted as two observations. The rationale behind this method lies in the ABA's ability to assign a new rating to a previously-reviewed nominee upon re-nomination. In reality, those nominees who are nominated repeatedly through successive congressional terms are often the most controversial, as was the case with nominees such as Priscilla Owen, Marsha Berzon, and Charles Pickering. This double- and even triple-counting gives additional artificial predictive power to the presumably most controversial observations within the analysis.

These methodological issues present serious concerns about the validity of the Vining et al.'s findings. My own empirical analysis, presented in Section III, avoids replicating these problems and attempts to better tap the reality of the ABA's evaluation of judicial nominees. Beyond its statistical shortcomings, however, Vining et al.'s conclusions raise additional concerns. Even were their measures and findings accurate, the authors conclude erroneously the evidence definitively points to a bias in the ABA's ratings of judicial nominees to the exclusion of any other possible interpretation.

The authors themselves raise the possibility of alternative explanations when they write, "We wonder whether there is something unique about Democratic or Republican nominees that explains the systematic bias we find in the ratings" (Vining et al., 23).

However, they then proceed to reject or, at least, ignore this possibility without further consideration in favor of the conclusion that the ABA is biased, even going so far as to offer some prescriptive measures to rectify the situation. Section IV of the present analysis seizes upon this issue and presents evidence for an alternate interpretation of Vining et al.'s findings.

My analysis thus proceeds in two parts. The first presents an empirical evaluation of the ABA's ratings in order to address Vining et al.'s claims of a documented bias against conservative nominees. The second presents a qualitative argument that addresses the nuances of the political reality in order to contextualize the empirical data and improve the precision of our understanding. Before proceeding with the analysis, however, we pause briefly to explain the process of the ABA's evaluations.

II. Background

Article II of the U.S. Constitution gives the president the power to appoint all federal officials with the "advice and consent" of the Senate (sect. 2). As with other officials nominated by the president, nominees for federal judgeships in accordance with Article III must be confirmed by a majority vote of the full Senate. While the Constitution provides no official requirements for nomination to a federal judgeship, presidents have typically drawn their nominations from a pool of legal occupations, including practicing lawyers, law professors, and judges.

History of the ABA's Involvement in Judicial Selection

The ABA first explicitly participated in the selection process during the Presidency of Harry Truman with the creation of the Standing Committee on Federal Judiciary in 1946 (Ross 1990, 35). The decision to create the Committee came after a

confluence of scandals surrounding the Supreme Court illustrated the need for a structured review process to determine the fitness of potential judges (for a detailed account of the period leading up to the creation of the Committee, see Grossman 1965). Among the most prominent of these scandals was the very public and very bitter feud between Supreme Court Justices Hugo Black and Robert Jackson over the Court's decision in *Jewell Ridge Coal Corporation v. United Mine Workers*. Opinion polls taken at the time showed broad public concern over the caliber of judges being appointed to the courts, and provided an opportunity for the ABA to step in as a review body equipped to evaluate the quality of nominees (Grossman 1965, 59).

Ironically, for much of its early history, the ABA's Standing Committee was perceived as an ideologically conservative body. The Committee's relationship with the Truman Administration was hostile, as the Senate Republicans viewed the ABA Committee as the "perfect instrument through which [they] could attempt inroads on the nominations of a Democratic President" (Grossman 1965, 65). The Committee's standing greatly improved under the vastly more receptive Eisenhower Administration, when it was formally introduced to the pre-nomination stage, the role it would hold until the administration of George W. Bush.

While the Committee retained its advisory role with the ascendance of John F. Kennedy to the Presidency, the old chilliness returned to the executive-ABA relationship with the return of a Democratic president. As Grossman, writing in 1965, observed, "Despite its public service and nonpartisan façade, the American Bar Association is, in terms of its political orientation and policy values, much closer to the Republican than the Democratic 'orbit' of supporting groups" (80).

Despite this originally conservative bent, the Committee periodically butted heads with Republican administrations over the years. The Reagan Administration repeatedly objected to what it viewed as too ambiguous language regarding the consideration of political ideology. Whereas in 1980 the ABA acknowledged the Committee would consider a nominee's political philosophy "to the extent that extreme views on such matters might bear upon judicial temperament or integrity," it later amended that stance under pressure from the Reagan Administration to one stating that political philosophy would not be considered (quoted in Ross 1990, 36). This squabble is characteristic of the somewhat distant relationship between the Reagan Administration and the ABA Committee. As characterized by Goldman, the Reagan Administration was "the first Republican Administration in 30 years in which the American Bar Association Standing Committee on Federal Judiciary was not actively utilized and consulted in the pre-nomination stage" (Goldman 1985, 316). At the same time, however, he emphasizes that this did not necessarily imply that "relations were cool" with the ABA, citing heavy involvement by the Committee after identifying nominees (Goldman 1985, 316).

However, it was during the Reagan Era that the conservative perception of the ABA began to shift. William G. Ross attributes this shift to the Reagan Administration's commitment to placing conservative ideologues on the bench "at the very time that the political tone of the ABA may have grown more liberal" (Ross 1990, 43). For the first time, he goes on to write, the ideology of the judicial nominees was more conservative than that of the ABA leadership. The Committee's split rating of Supreme Court nominee Robert Bork also contributed to conservative unhappiness, and would be cited

as a turning point in the mounting tension between conservatives and the ABA (Torry 1996).

While the ABA maintained its White House advisory role during the Clinton Administration, it became a lightning rod for conservative criticism. Senate Majority Leader and Republican Presidential Nominee Bob Dole cited the Committee's record of evaluations as well as the ABA's controversial stance on abortion, school prayer, and flag-burning as evidence of the organization's "blatantly…liberal" bias in calling for its removal from the selection process (Torry 1996). These were the same reasons Senate Judiciary Committee Chairman Orrin Hatch gave less than a year later when he removed the ABA from its official advisory role to the Judiciary Committee (Torry 1997). While the ABA Committee retained its more important White House role, Hatch's decision was nonetheless emblematic of Republican unhappiness with the ABA during the Clinton years.

This tension came to a head during the administration of George W. Bush. Only two months after taking office, the White House announced its decision to end the ABA Committee's sixty-year involvement in the pre-nomination stage (Goldstein 2001). While Attorney General John Ashcroft's letter announcing the decision cited as motivation the fact that the ABA was simply one voice out of many and thus did not warrent its special distinction, conservative suspicion of a liberal bias by the Committee clearly played a role in decision (Goldstein 2001).

The ABA Rating Process

Prospective nominees to the federal bench are forwarded to the ABA's Standing Committee on the Federal Judiciary. The 15-member committee evaluates the

professional qualifications of nominees based on three criteria: integrity, professional competence, and judicial temperament. The Committee is charged to consider only these professional qualifications, disregarding a nominee's "philosophy, political affiliation or ideology" (ABA 2009, 1).

In evaluating a prospective nominee's integrity, the Committee evaluates the individual's standing in the legal community. The prospective nominee's professional experience, written skills, analytical ability, legal acumen, and judgment comprise the area of professional competence. Finally, judicial temperament, the foggiest of the three criteria, considers a nominee's "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law" (ABA 2009, 3).

Upon receipt of a potential nominee's name, a member of the Committee, typically from the judicial circuit of the vacancy to be filled, is assigned to the evaluation. The evaluator receives a copy of the nominee's completed Personal Data Questionnaire (PDQ) provided by the Department of Justice. At this point, the evaluator conducts a comprehensive review of the prospective nominee. This review encompasses the nominee's responses to the PDQ, legal writings, decisions, briefs, memoranda, speeches, publications, and other materials. The evaluator also interviews a wide variety of sources to gauge the nominee's reputation, competence, and temperament. These sources may include, but are not limited to, judges, lawyers, law school professors, community leaders, and representatives of legal organizations.

A personal interview with the prospective nominee typically occurs toward the end of these interviews. This interview typically gives the prospective nominee the

opportunity to address any concerns about his or her professional qualifications, physical fitness, or temperament that may have arisen during the previous stages of the evaluation.

Following this interview, the evaluator prepares a written evaluation, designated the Informal Report, that is forwarded to the chair of the Committee. After preliminary review of the Informal Report, the chair alerts the White House as to the probable outcome of the evaluation. A Formal Report is then prepared for consideration by the full Committee. The members then review this report and submit their votes on the nominee's rating (ABA 2009, 6).

Originally, the ABA awarded four possible ratings: "Exceptionally Well Qualified," "Well Qualified," "Qualified," and "Not Qualified." In 1989, the ABA consolidated the two highest ratings by removing "Exceptionally Well Qualified" (Goldman 1991, 296). A "Well Qualified" rating, as expected, indicates that the nominee exceeds the standards of each of the ABA's three criteria, while a "Qualified" rating indicates that the nominee satisfies these standards. A "Not Qualified" rating, the least common of the three possibilities, indicates that the nominee fails to meet the Committee's standards "with respect to one or more of its evaluation criteria" (ABA 2009, 6). In the event that a vote is not unanimous, the nominee receives a "mixed" rating, which includes the minority rating (e.g. "Well Qualified/Qualified").

After the vote is tallied, the Chair informs the White House of the nominee's rating. In the case of a potential "Not Qualified" rating, the Chair will inform the White House of the likelihood of such a vote beforehand and offer the option of a second evaluator. The White House can then decide to pursue the evaluation or abandon the rating process. This potential second evaluator performs a thorough review of the

original investigation and may conduct additional interviews. If the President subsequently nominates the prospective nominee, the ABA publishes his or her rating on its website in addition to notifying the Justice Department and each member of the Senate Judiciary Committee. If the President chooses not to nominate a rated nominee, that rating is never published (ABA 2009, 7).

The review process speaks to the potential value of completing the evaluation before the prospective nominee is officially nominated. As the process relies heavily upon personal interviews, the manner in which colleagues and associates of a prospective nominee answer questions regarding their views on the nominee may very well change if the interview occurs after the official nomination, as it did during the administration of George W. Bush. Put simply, interviewees may be less likely to speak negatively about the qualifications, integrity, and temperament of a given nominee if he or she has already been given the official public support of the president.

III. Evaluating the ABA's Ratings Empirically

Theories and Hypotheses

The first part of my analysis replicates the Vining et al. piece's aims while hopefully avoiding the methodological concerns detailed in the previous section. Thus, the theories and expected relationships in the current analysis are much the same as those presented by Vining et al., though there are slight differences. Vining et al. adopt two theories to guide their analysis, which they dub the "political theory" and the "professional theory" (8). The former holds that the ABA considers a nominee's political ideology in determining his rating, while the latter holds that the ABA considers only professional factors in assigning ratings. As the political and professional theories

presented by Vining et al. accurately convey the opposing opinions of the ABA's evaluation criteria, this analysis makes no changes to these theoretical propositions but rather I significantly alter the variables used to evaluate them. With the conceptualization and application of better metrics to capture the two theories, my own analysis finds more empirical support for the professional theory. Unlike Vining et al.'s conclusion that the ABA is politically biased against conservatives, the current model suggests that the ABA does not favor either ideological extreme, but rather fashions itself as safeguarding the middle of the political spectrum.

The dependent variable under study is the ABA rating of the appointee. The variable is coded into categories matching the three possible ratings of "Well Qualified," "Qualified," and "Not Qualified." While early attempts broke out ABA scores by minority rating for greater precision as in Vining et al. (e.g. "Well Qualified/Qualified,"), the predictive power of the highest rating was so great that any gain in precision was overcome by loss in the overall usefulness of the model. In other words, the model behaves in such a way that designating the dependent variable by minority rather than simple majority ratings weakens its explanatory power. For this reason, simple majority ratings are used throughout.

To evaluate the political theory, five independent variables are used. *Appointing President* is coded as a dummy variable describing the appointing president of the appointee. *Political Ideology* uses Poole's Common Space Score for each president. The measure, based on the NOMINATE scores compiled through Congressional Quarterly's Presidential Support Roll Call, places each president on a continuum of scores, -1.0 being the most liberal ranging to 1.0, the most conservative (For information on NOMINATE

values, see Poole 1995). The presidents' Common Space Scores are used in place of those of the home-state senators (as is done in Vining et al.). This decision was made regarding the circuit court appointees based on the reality that senatorial courtesy is much reduced in circuit court nominations which occur in a region and not, exclusively, in a state, *per se*. While senatorial courtesy would lead one to intuit that the home-state senators' score would be a more accurate measure in district court nominations than in circuit court nominations, a recent study found that the policy preferences of district court judges actually correspond most closely to those of the appointing president (see Johnson and Songer, 2003). This finding lends even greater credence to my utilization of presidential, not senatorial, ideology. Accordingly, the appointing president's Common Space Score are used for both circuit and district court appointees. *Democrat* and *Republican* denote the party identification of the appointee. *Past Party Activism* is a dummy variable that encompasses any prior experience in a partisan position, greatly expanding the narrow spartan measure employed by Vining et al.

Four independent variables are utilized to articulate the professional evaluative model. *Experience as a Magistrate*, *Experience as a Law Professor*, and *Private Practice Experience* are all dummy variables indicating the appointee's possession of each characteristic. *Judicial Experience* comprises the number of years the appointee has worked as a local, state, or federal judge. Federal and state/local experience are broken out into two variables for circuit court appointees.

Finally, three independent variables control for demographic characteristics. *Gender* discriminates between male and female appointees. *Race* separates appointees

into categories of white and non-white. *Age* is simply a measure of the appointee's age at the time of his appointment.

Each independent variable has a hypothesized effect on an appointee's ABA rating. Considering the political variables first, they reflect the claim that the ABA is biased in its ratings against conservative nominees. Thus, I hypothesize that *judges appointed by Democratic presidents are more likely to achieve the highest rating than those appointed by Republican presidents*. Accordingly, *appointees whose appointing president has a liberal Common Space Score are more likely to achieve the highest rating than those appointed by presidents with conservative Common Space Scores*. If there is a bias against conservative nominees in the ABA's evaluations, however, it may not be restricted to the characteristics of the appointing president. While rare, presidents have occasionally appointed judges from political parties other than their own. I hypothesize, then, that *Republican appointees will be less likely to achieve the highest rating than Democratic appointees.* Finally, as detailed earlier, the ABA once held the view that political ideology would not be considered except "to the extent that extreme views on such matters might bear upon judicial temperament or integrity" (quoted in Ross 1990, 36). While the ABA has since retreated from this position, it is nonetheless indicative that the evaluation process may be sensitive to ideological extremity in nominees. Accepting past party activism as an explicit expression of ideological extremity, I thus hypothesize that *those appointees with past party activism will be less likely to achieve the highest rating than those appointees without past party activism.*

Moving to the legal occupational variables, I hypothesize the relationships to be generally positive. A recent trend over the last few decades has been to tap into the pool

of federal magistrate judges for nominations to "Article III" judgeships. While magistrates lack many of the features of Article III judges, they bring unique experience working within the federal court system, making them particularly attractive candidates for district court nominations. Thus, I hypothesize that *those appointees with experience as a federal magistrate will be more likely to achieve the highest rating than those appointees without experience as a federal magistrate*. Anticipating the effect of serving on a law school faculty on an appointee's rating is somewhat more difficult. While it is true that many legal scholars have become federal judges, the trend in recent decades has been to favor potential appointees with courtroom or litigation experience. This kind of legal work is seen, fairly or unfairly, as more practical and less abstract than the work of a law professor. While one could argue that legal scholarship prepares a potential nominee for opinion writing (a substantial facet of any federal judge's duties, particularly at the appellate level), my hypothesis reflects the trend toward practical experience. Therefore, I hypothesize that *those appointees with experience as a law professor will be less likely to achieve the highest rating than those appointees without experience as law professor.* Private practice experience, likely representing the most common form of practical legal experience, would be seen as a boon to any potential nominee, particularly if it included experience in litigation. Therefore, *those appointees with private practice experience will be more likely to achieve the highest rating than those appointees without private practice experience.* The final legal occupational variable, judicial experience, is anticipated to be the most powerful predictor of ratings success (see Slotnick 1983, Lott 2001, Haire 2001, Vining et al. 2009). The rationale behind this expectation lies not only in the findings of previous scholarship, but also in the highly intuitive notion that the best

indicator of future success as a judge is past experience as a judge. Therefore, I hypothesize that *those appointees with more judicial experience will be more likely to achieve the highest rating than those appointees with less judicial experience*. As an ordinal variable, I expect this effect will increase according to the appointee's years of experience.

Finally, the history of ABA ratings has shown demographic variables to be of significance to ratings success. Nontraditional nominees (i.e. nominees who are not white males) have typically been less likely to achieve the highest ratings than traditional nominees. Therefore, I hypothesize that *female appointees will be less likely to achieve the highest rating than male appointees*, and *non-white appointees will be less likely to achieve the highest rating than white appointees*. Lastly, the ABA has shown a slight preference for older nominees over the years (see Slotnick 1983). While most of this preference is likely due to older nominees' greater period of opportunity to accumulate legal experience, I nonetheless hypothesize that *older appointees will be more likely to achieve the highest rating than younger appointees*. Table I summarizes all hypotheses.

Table I. Independent Variables and Hypothesized Effect on ABA Rating

Category	Variable	Measure	Expected Effect
Political	Appointing President	Appointed by Carter, Reagan, Bush, or Clinton	- (If Republican)
	Political Ideology	Poole Common Space Score	-
	Party Affiliation	Appointee's political identification	- (If Republican)
	Past Party Activism	Appointee has been active in party	-
Legal Occupational	Magistrate	Served as federal magistrate	+

	Law Professor	Served on law school faculty	-
	Private Practice	Experience in private practice	+
	Judicial Experience	Years as state or federal judge	+
Demographic	Gender	Appointee is female	-
	Race	Appointee is a minority	-
	Age	Age at appointment	+

Methods

An ordered logit analysis was used to measure the statistical significance of the eleven independent variables on the dependent variable, ABA rating. The existence of three possible values in the dependent variable necessitated the use of an ordinal model over a linear model. The ordered logit model also better reflects reality by not assuming a linear relationship between each possible output. That is to say, the model does not assume that the difference between a "Well Qualified" appointee and a "Qualified" appointee is the same as the difference between a "Qualified" appointee and an appointee rated "Not Qualified." All probabilities were created through the use of Gary King's Clarify program (see King 2001, King et al. 2000).

All district and circuit court judges appointed from the only term of President Carter through the second term of President Clinton (1976-2000) are included in the analysis. Because of differences in the qualifications and types of candidates nominated for each court level, the pools of district and circuit court appointees are evaluated separately. This division may also inform us of differences in the nature of the ABA's evaluation of district court versus circuit court appointees. While the additional observations of all candidates *nominated* during the defined period and not simply those

confirmed would have undoubtedly strengthened the analysis, the nature of the project dictated the use of freely available data. With a sizeable and diverse population of over 1,000 observations, however, the model is still highly informative of the ABA rating process. An additional limitation of the data set is that information was only available through the Clinton Administration, leaving George W. Bush's appointees out of the analysis. While this is regrettable, it was at the close of President Clinton's time in office that the second President Bush removed the ABA from its formal role over concerns of a bias against conservatives. The data set, then, reflects exactly the information available to the Bush Administration when it made this claim. Furthermore, through the inclusion of President Carter's appointees, President Reagan's first-term appointees, and district court appointees for all presidents under study, my analysis contains signficiantly more data than was utilized in Vining et al.

Results

For both district and circuit court data sets, two models were generated. The first model features the dummy variables corresponding to each president, while the second uses the Common Space Score. The variables were separated due to multicollinearity, but also to distinguish whether the ABA's ratings changed according to ideology or if certain presidents had a particularly strong or weak relationship to ratings success. For the reader's benefit, Table II contains a summary of all independent variables.

Table II. Summary of Independent Variables

Variable	Type	Value
Appointed by Reagan	dummy	No/Yes
Appointed by G.H.W. Bush	dummy	No/Yes
Appointed by Clinton	dummy	No/Yes

Common Space Score	ordinal	-1.0—1.0
Democrat	dummy	No/Yes
Republican	dummy	No/Yes
Past Party Activism	dummy	No/Yes
Magistrate	dummy	No/Yes
Law Professor	dummy	No/Yes
Private Practice	dummy	No/Yes
Federal Judicial Experience	ratio	Years
State/Local Judicial Experience	ratio	Years
Non-white	dummy	No/Yes
Female	dummy	No/Yes
Age	ratio	Years

Table III contains the results of the logit regression for district court appointees. As previously stated, the regression analysis employs two models: Model 1 contains variables for each individual president, while Model 2 contains the Common Space Score to measure ideology more precisely. The model itself performs well overall, fitting significantly better than an empty model. In other words, the model allows us to explain success in ABA ratings better than if we used no model at all. Additionally, the differences between the models are extremely slight; only one variable, gender, loses one level of significance, from $p<.001$ to $p<.01$.

Table III. District Court Appointee ABA Ratings		
Independent Variable	Coefficient	
	Model 1	Model 2
Reagan	.37 (.31)	-
Bush	.66*	-

	(.33)	
Clinton	.36 (.20)	-
Common Space Score	-	.31 (.26)
Democrat	-.03 (.35)	-.03 (.35)
Republican	-.49 .38	-.53 .38
Past Party Activism	-.46** (.15)	-.45** (.15)
Magistrate	.68* (.27)	.74** (.27)
Law Professor	-.02 (.28)	-.03 (.28)
Private Practice	.61* (.26)	.58* (.25)
Federal Judicial Experience	-	-
State/Local Judicial Experience	.03* (.01)	.03* (.01)
Non-white	-1.10*** (.20)	-1.08*** (.20)
Female	-.70*** (.20)	-.63** (.19)
Age	.03** (.01)	.03** (.01)
	N = 945 LR Chi2 = 95.39 Prob > chi2 = 0.000 Log likelihood = -633.39806	N = 945 LR Chi2 = 90.81 Prob > chi2 = 0.000 Log likelihood = -635.68977
*p<.05; **p<.01; ***p<.001		

The district court model displays a number of statistically significant relationships. Amongst those at the lowest level of significance ($p<.05$) are experience as a magistrate, private practice experience, state/local judicial experience, and appointment by President Bush. Age and past party activism comprise the next level of significance ($p<.01$; experience as a magistrate and gender also fall into this category in the second model). Finally, race and gender are significant at the highest level ($p<.001$).

The most obvious omissions from this wealth of significant variables are those variables that capture the political theory. With the exception of Bush appointees, neither the individual presidents nor Common Space Score are statistically significant. Likewise, the party identification of the appointee is not significant. The political variable of past party activism is significant, and negatively correlated as expected. While this significance does lend some support to the political theory, it does so in a way that does not necessarily agree with the claim of a specific bias against conservatives. The calculated change in probability (0.10) of achieving the highest ABA rating was the same for Democratic appointees with/without past party activism as it was for Republican appointees with/without past party activism. Additionally, as indicated in Table IV, President Clinton's appointees displayed the lowest prevalence of past party activism, which can help explain his success relative to previous presidents without appealing to any partisan bias. As will be discussed in the following section at more length, this figure is indicative of Clinton's valuing diversity over ideology in appointing judges to the federal bench.

Table IV. Prevalence of Past Party Activism, District Court Appointees	
President	Appointees with Past Party Activism
Carter	61.1% N = 124
Reagan	60.3% N = 175
Bush	64.2% N = 95
Clinton	50.2% N = 153

The additional statistical significance of President Bush as the appointing president detracts further from conservative claims of bias. Surprisingly, and counter to my hypothesized effect, appointment by President Bush is *positively* correlated to ratings success. Because of the way the variables are implemented, this essentially means that the Republican President Bush's judges were significantly *more* likely to achieve the highest ABA rating than those appointed by the Democratic President Carter. Thus, even those political variables that are statistically significant do not support claims of an ABA ratings bias against conservative judges.

As expected, the bulk of the statistically significant variables lie within the professional theory and demographic characteristics. Table V summarizes the predicted change in probability of achieving the highest rating with changes in each significant variable. These predicted probabilities are informative of the relative importance of changes in different independent variables. In the case of dummy variables, the value is

simply changed from not present to present. In the case of ordinal variables, the value is changed according to theoretically interesting increments.

Table V. Likelihood of Receiving a Well Qualified Rating, District Court Appointees		
Independent Variable	Coefficient	Probability Change
Bush	.66 (.33)	0.16 No → Yes
Past Party Activism	-.46 (.15)	-0.11 No → Yes
Magistrate	.68 (.27)	0.16 No → Yes
Private Practice	.61 (.26)	0.15 No → Yes
State/Local Judicial Experience	.03 (.01)	0.10 0 yrs. → 15 yrs.
Non-white	-1.10 (.20)	-0.27 No → Yes
Female	-.70 (.20)	-0.17 No → Yes
Age	.03 (.01)	0.10 30 yrs. → 45 yrs.

Somewhat surprising is the fact that state/local judicial experience has the smallest predicted change in probability. Even in moving from an appointee with no judicial experience to one with fifteen years experience, the change in probability is only one of ten percent (fifty-four percent for the former to sixty-four percent for the latter). Age also results in only a ten percent increase. Appointment by President Bush results in a surprising sixteen percent *increase* over those judges appointed by President Carter.

Past party activism had minor effects relative to the other variables, resulting in only an eleven percent negative change. Despite its significance, it is a less powerful predictor than other non-political variables such as private practice experience, magistrate experience, gender and race. All of this indicates much more limited support for the political theory than Vining et al. find with their model. By contrast, all professional variables, with the exception of experience as a law professor, are significant and positively correlated to ratings success. The district court model is thus entirely consistent with the professional theory.

Moving to Courts of Appeals appointees, the two-model approach is replicated. As the second level of the federal court system, the variable of federal judicial experience is now present. The model performs very well, fitting significantly better than an empty model. Thus, once again, utilizing the model serves our analysis better than utilizing no model at all. There are no differences in statistically significant variables between the two models.

Table VI. Circuit Court Appointee ABA Ratings

Independent Variable	Coefficient	
	Model 1	Model 2
Reagan	-1.25 (.92)	-
Bush	-.89 (.95)	-
Clinton	.27 (.49)	-
Common Space Score	-	-1.01 (.80)
Democrat	-.23	-.08

	(.87)	(.83)
Republican	-.30 1.00	-.36 .98
Past Party Activism	.04 (.37)	.03 (.36)
Magistrate	-.88 (.90)	-.83 (.90)
Law Professor	-.23 (.38)	-.28 (.37)
Private Practice	.12 (.54)	.09 (.53)
Federal Judicial Experience	.23*** (.06)	.24*** (.06)
State/Local Judicial Experience	.01 (.03)	.01 (.03)
Non-white	-1.10* (.50)	-1.02* (.50)
Female	-.87 (.45)	-.79 (.44)
Age	.03 (.02)	.04 (.03)
	N = 232 LR Chi2 = 48.32 Prob > chi2 = 0.000 Log likelihood = -120.32538	N = 232 LR Chi2 = 47.16 Prob > chi2 = 0.000 Log likelihood = -120.90444
*p<.05; **p<.01; ***p<.001		

In contrast to the district court model, the circuit court model contains few statistically significant variables. This indicates either that the ABA's evaluation of circuit court appointees is harder to capture statistically than its evaluation of district court appointees, or that the addition of a new, extremely powerful predictive variable in

the form of federal judicial experience lessens the importance of the other independent variables. Indeed, federal judicial experience is significant at the highest level ($p<.001$), while the only other significant variable, race, is significant at the lowest ($p<.05$). Race is once again negatively correlated.

Table VII. Likelihood of Receiving a Well Qualified Rating, Circuit Court Appointees		
Independent Variable	Coefficient	Probability Change
Federal Judicial Experience	.23 (.06)	0.24 0 yrs. → 15 yrs.
Non-white	-1.10 (.50)	-0.21 No → Yes

Table VII contains the predicted change in probability for both significant variables. Federal judicial experience does indeed prove an extremely powerful predictor of ratings success, moving from a seventy-four percent chance of achieving the highest rating with no federal experience to a ninety-eight percent chance with fifteen years judicial experience. This supports the theory that federal judicial experience far surpasses other variables in the ABA's evaluation criteria for circuit court appointees. This is entirely consistent with the professional theory.

Noticeably lacking are significant variables in support of the political theory. Vining et al. find ideology score, experience as a congressional staffer, and Democratic president nomination significant with their Circuit court model; my own model finds no such result. While the results of the analysis cannot confirm definitively the lack of political bias in the ABA's ratings, if there is some political bias, it cannot be captured

empirically using measures more highly articulated, sophisticated and developed than those of the Vining analysis.

This statement is supported by the fact that the district court and circuit court analyses concur with each other and remain consistent with the professional theory of ABA evaluation, despite distinct differences in the number of statistically significant variables present. To the extent that the ABA does consider political attributes, as evidenced by the district court analysis, it appears to do so only in terms of partisan activity and not simply a metric of political philosophy. Moreover, this negative association with partisan activity does not demonstrate a bias against one particular political ideology or party, affecting both Democratic appointees and Republican appointees equally. That this finding is significant only for district court judges is not entirely surprising. As they are generally considered less important than circuit court seats and are contained wholly within a given state, district court vacancies are much more likely to be used for political patronage. Furthermore, the positive correlation of appointment by President Bush to ratings success stands in stark contrast to the claim that Democratic nominees receive better treatment than Republican nominees.

The negative correlation associated with gender and race in the district court analysis and race in the circuit court analysis is somewhat troubling. Rather than indicate any explicit discrimination by the ABA, however, this phenomenon is more likely attributable to the presence of President Carter's appointees in the sample. Carter made a significant push to diversify the federal bench at a time when institutional biases led to fewer opportunities for females and minorities to acquire professional qualifications on

par with white males. This emphasis on diversity will be considered at more length in the following section.

Thus, our findings are largely consistent with those found by Slotnick in his original evaluation of the ABA's rating criteria almost three decades ago (1983, 392). As in the Slotnick study, the variables most associated with ABA ratings are legal occupational and demographic, with the singular exception of partisan activism amongst district court appointees. These results stand in stark contrast to the ideologically-driven findings in Vining et al. However, utilizing more theoretically-sound variables, a wider sample size and a longer period of study gives us sufficient confidence that my findings better represent the political reality than those in Vining et al.

IV. Evaluating the Qualitative Reality of Judicial Selection

Having addressed the analytical issues in the Vining piece with an attempt at a more thorough and sophisticated empirical evaluation, some attention must also be paid to the authors' interpretations of their findings. While the better metrics utilized for my analysis in the preceding section give us confidence that it better captures the reality of the situation than Vining et al.'s model, their findings cannot be simply dismissed. Even accepting their findings as true, however, does not lead inevitably to the conclusion that the ABA is biased against conservative nominees, as the authors suggest. Instead, a qualitative examination of the different approaches of Democratic and Republican presidents to selecting judges suggests that Vining et al.'s results are as much a product of the period of study chosen as they are indicative of any systemic bias in ABA ratings.

Simply put, the Republican presidents included in Vining et al.'s data set (Reagan, George H.W. Bush, and George W. Bush) approached judicial selection with

fundamentally different goals and thus, fundamentally different selection criteria than the one Democratic president in the analysis (Clinton). Presidents Reagan, H.W. Bush, and W. Bush viewed the judiciary as a potentially powerful tool for implementing their conservative policy preferences. Accordingly, staffing the courts with like-minded judges was a priority of their domestic policy agenda. Conversely, the moderate President Clinton did not place great emphasis on the judiciary, opting for safe candidates rather than those that most closely aligned to any platform of liberal policy preferences. In doing so, he fits within an alternative Democratic approach to judicial selection, first established by President Carter, that prioritizes diversity over ideology. Indeed, to the extent that it can be measured, President Obama's early nominees to the federal bench are most notable for their diversity rather than their staunch liberalism.

More to the point, it can be argued that the contemporary history of judicial selection politics, starting with Jimmy Carter until the present, underscores that while Republican presidents have prioritized ideology, for Democrats, policy has been trumped by diversity as a treasured value. The following subsections flesh out these claims in more detail, first reviewing selection under the Republican presidents included in Vining et al. before turning to the Democratic approach employed by Carter, Clinton, and Obama.

Selection Under Reagan

Ronald Reagan began the conservative trend of placing ideologues on the bench when he ascended to the presidency in 1981. As David Yalof observes, the Democratic House of Representatives inspired the Reagan administration to regard the judiciary as an invaluable tool in effecting its conservative ideology and an alternative to negotiating

with Congress (133). Reagan fully understood the potential of the courts to "allow an administration to leave its imprint on public policy long after the life of an administration itself" (Goldman 1983, 335). Furthermore, he valued the ideology of his nominees over other potential aspects such as diversity, as evidenced by the words of Jonathan Rose, Reagan's assistant attorney general for legal policy: "The President is unwilling to put someone on the court that does not share his views on the role of the courts in our society, just because that person belongs to a particular group" (Goldman 1997, 290).

Reagan immediately set about effecting this policy: during the first two years of the administration, Reagan's district court nominees held the highest proportion of appointments affiliated with the president's party and prominent past party activism going back to the Wilson Administration (Goldman 1983, 340). In that same period, one-hundred percent of Reagan's nominees to the appeals courts were Republican, the highest such figure among the previous five administrations, both Republican and Democratic (Goldman 1983, 345).

The administration's emphasis on the judiciary became only more prominent over time, as a number of high-profile controversies like the failed attempted nomination of Robert Bork highlighted the president's willingness to go to bat for his conservative nominees. As characterized by Sheldon Goldman, "Throughout the second term, the administration appeared not to waver in its commitment to seek out and nominate those in harmony with the president's judicial philosophy" (1989, 319). Goldman also calls Reagan's screening of potential nominees' judicial philosophy the most systematic of any president until that time (1989, 319-320).

This ideological strategy was most pronounced amongst nominees to the Courts of Appeals, where the greatest potential for policymaking lies. No Democrats were appointed to the circuit courts during the entirety of the Reagan administration. Additionally, the ascendance of Edwin Meese III to Attorney General in Reagan's second term led to what Goldman dubs the "Meese effect" (1989, 327). This period saw the highest past party activism amongst the nominees with a corresponding decrease in professional experience and ABA rating. The motive behind this trend was "to place on the bench younger, vigorous, more aggressive supporters of the administration's judicial philosophy that would indeed constitute a lasting Reagan legacy on the courts second in importance only to the U.S. Supreme Court" (Goldman 1989, 327). Under any measure, Reagan succeeded in this aim, appointing more judges than any other president, cementing his legacy in the judiciary by transforming it into a powerful tool for promulgating and protecting conservative policies.

Selection Under George H.W. Bush

Unsurprising given his involvement in the Reagan Administration, George H.W. Bush continued the trend of placing conservative ideologues on the bench begun by Reagan. An early scuffle between the president and prominent right-wing Republicans over his desired deputy attorney general, Robert Fiske, demonstrates the care with which the elder Bush regarded judicial selection. Ironically, this scuffle involved the ABA Standing Committee on the Judiciary. Right-wing Republicans expressed concern over Fiske's potential appointment due to his previous stint as chairman of that committee, which they felt had improperly treated nominees on the basis of their political leanings (Goldman 1991, 295). The Bush Administration, hoping to quiet the issue by going on

the offensive, pressed the ABA to reaffirm its policy of not considering a nominee's ideology and eventually withdrew Fiske's name from consideration for the job.

The process of selecting judges remained very much the same under Bush as it had been under Reagan, including the systematic vetting of judicial philosophy. The resulting appointments to the bench were thus very much in line with those made by Reagan, though in sufficiently fewer numbers owing to Bush's single-term administration. According to Goldman's 1993 review, Bush's nominees were slightly less Republican than Reagan's (88.5 to 93.1 percent), but displayed an even higher incidence of past party activism (60.8 to 58.6 percent) (287). These numbers are entirely consistent with our own data set.

The picture that emerges from these figures is one of an administration very much in line with its predecessor. While foreign policy issues like the Gulf War and domestic issues like the economy garnered the most headlines, George H.W. Bush was nonetheless fully committed to the judiciary as a tool for implementing his conservative policy preferences. Like Reagan before him, Bush chose judicial nominees with a heavy inclination toward those that best matched his ideological platform.

Selection Under George W. Bush

While the administration of George W. Bush was characterized by unexpected foreign policy developments in the wake of the September 11th terrorist attacks, Bush came to office with an emphatic appreciation for the importance of the judiciary in creating and implementing his vision of "compassionate conservatism." Despite these early shakeups, Bush remained dedicated to this task and achieved inarguable success in his mission to appoint strong conservative judges to the bench. Brett Kavanaugh, then

Associate White House Counsel, spoke of the importance given to the issue of judicial selection by the White House to Goldman et al.: "[Bush] is very interested in [judicial selection] and thinks it is one of his most important responsibilities on the domestic side. Obviously, he has a lot of things going on, but he has devoted more attention to the issue of judges than any other president" (2003, 284).

The process by which nominees were identified and ultimately selected under the Bush Administration closely resembled that of the prior presidents already described. Goldman et al., in their 2003 review of the early selection process under Bush, highlight the subtle change in the name of the office handling the bulk of the selection duties from the Office of Policy Development to the Office of Legal Policy (284). This change was a reversion from the name used under George H.W. Bush to the name used under Reagan, a possible signal of W. Bush's intention to approach the judiciary as Reagan did, with a strong eye toward heavily conservative nominees.

Whether or not this was a conscious decision by the Bush Administration, there can be little argument that Bush, like his father and Reagan before him, appointed to the federal bench a contingent of judges that very closely corresponded to a conservative political agenda. Indeed, in their 2009 summary of Bush's eight years of judicial selections, Goldman et al. describe his appointees as "a veritable all-star team of conservative judges with strong appeal to the Republican base" (260). While Bush appointed more judges from the parties other than his own than his predecessors, this trend was largely limited to the less-important district courts. The percentage of appointees from his own party, at 91.5%, was second only to Reagan's 96.2% amongst

presidents from Carter on (Goldman et al. 2009, 284). His appointees' incidence of past party activism, at 67.8%, was third behind Carter and George H.W. Bush.

Bush proved to be consistently committed to judicial selection throughout his two-term presidency. Even in the last two years of his term, when the nomination and confirmation process typically slows down greatly, Bush appointed more judges than his predecessors. That he accomplished this despite the fact that control of the Senate tipped toward the Democrats is evidence of his commitment to the judiciary. In surveying the process by which he chose nominees and his ultimate success in seeing his nominees confirmed, we can say that Bush cemented the conservative transformation of the federal judiciary begun by Reagan two decades earlier. Bush's appointees, like those originally envisioned under Reagan's approach, were young, strong conservative ideologues whose influence on the federal bench will be felt for years to come.

Selection Under Clinton

In turning to consider judicial selection under President Clinton, the only Democratic president included in Vining et al.'s period of study, it is clear his approach to the federal judiciary presents a stark contrast the ideologically driven approach that characterizes the Republican presidents. From the very beginning of his presidency, Clinton did not view judicial selection as a high-priority issue in his domestic agenda. Accordingly, his appointees to he federal bench were not characterized by their staunch ideological liberalism. If any clear agenda can be identified as guiding Clinton's selection process, it was his aim, like President Carter before him, to more greatly diversify the federal bench (Wilson, 36).

The Clinton Administration's process for identifying and nominating potential judges did not differ greatly from those of presidents already discussed, though it did have a less contentious relationship with the ABA. Additionally, Goldman and Slotnick's 1997 description of the White House's identification process suggests there was more involvement and consultation with home state senators than under, for example, George W. Bush (254). This speaks to the diminished interest and non-confrontational approach the Clinton Administration adopted toward judicial selection.

As already suggested, this approach had a large effect on differentiating the profile of the typical Clinton nominee from that of the typical Republican nominee. Quoted in Goldman and Slotnick, a senior member of the Clinton selection team, described the attitude of both the White House and the Justice Department: "Neither side is running an ideology shop…[T]his is not a do or die fight for American culture. This is an attempt to get…highly competent lawyers on the federal bench so they can resolve disputes" (1997, 256). While every presidential administration produces these kinds of statements to some extent, a review of the ultimate pool of Clinton appointees underscores the truthfulness of the quote.

Clinton's district court appointees had the lowest incidence of past party activism of any of president in the period of study, as well as the highest incidences of judicial experience and Ivy League legal educations (Goldman et al. 2009, 279). Likewise, his appointees to the Courts of Appeals had the lowest incidence of past party activism and were the most likely to come from a party other than his own (Goldman et al. 2009, 284). Even beyond the numbers, the Clinton judges are characterized by their moderation. While some conservative commentators understandably rejected the notion that Clinton's

appointees were not ideologically liberal, many liberal observers of the process expressed disappointment at Clinton's selection record. About Clinton's approach to the selection process, Alliance for Justice President Nan Aron said that he "chose the much easier route, which was to nominate people who could get through…I think his legacy is very mixed because, I think yes, he has gotten moderate judges, but he failed to talk about justice…" (qtd. in Goldman et al. 2001, 254). The title of an article by John Nichols that appeared in a 1996 edition of *The Progressive* further indicates liberal discontent: "The Clinton Courts: Liberals Need Not Apply."

The article aggressively attacks Clinton's somewhat disinterested approach to the judiciary, including a handful of biting quotes from Stephen Reinhardt, a sitting judge on the Ninth Circuit: "There are no liberals being placed on the courts by Bill Clinton…[he] seems to consider the courts unimportant…To him, judicial nominations are things to be traded for political advantage…If he thought it would make him more popular, he'd appoint Caligula" (qtd. in Nichols 1996). Nichols, injecting his own commentary, opines, "Indeed, Caligula would probably have a better shot at being nominated these days than a genuine liberal in the tradition of William O. Douglas" (Ibid.)

Controversial Roman emperors aside, these statements are nonetheless indicative of the Clinton Administration's commitment to appointing non-confrontational, non-ideological judges. And while these quotes may be simply dismissed as sour grapes from fringe ideologues unhappy with the degree of ideological extremity in Clinton's appointees, we find no such complaints from conservative observers over the selection approaches of Reagan, H.W. Bush, and W. Bush. Granted, there were instances of concern over a particular nominee (as in the Harriet Miers incident), but conservative

interest groups clearly seemed genuinely satisfied with the Republican presidents' overall selection records.

The Democratic Approach

While Clinton is the sole Democrat in Vining et al.'s data set, we can identify a broader Democratic approach to judicial selection (much like we can identify a Republican approach) by comparing his selection record to that of other modern Democratic presidents. Viewed in this context, Clinton's preference for diversity over ideology on the federal bench is not simply a personal inclination, but rather a continuation of a tradition first established by Jimmy Carter.

At the time he left office, Carter had appointed more district and appeals court judges than any other president in history (Goldman 1980, 344). Arguably more important to his judicial legacy, however, was the demographic profile of that pool of appointees. In his effort to diversify the federal bench and open up the selection process to women and minorities, Carter appointed record numbers of nontraditional judges (Goldman 1980, 355). Tellingly, it was a Democrat, Clinton, who ultimately surpassed Carter's judicial appointment numbers in terms of diversity.

Looking to the current president, we see this prioritization of diversity not simply continued but greatly expanded. While Obama's judicial selection record is still in its infancy, his early nominations are astonishing for the sheer numbers of nontraditional candidates. Through the first fifteen months of the Obama presidency, of those nominees that have been confirmed by the Senate, almost half are women (48.2%). Furthermore, almost half are minorities. This figure includes 25.0% Africa-American, 10.7% Hispanic-American, and 10.7% Asian-American (Information obtained from current data

files of Professor Sheldon Goldman, University of Massachusetts).. If these numbers hold up in the remaining years of his presidency, Obama will have far surpassed the record numbers for nontraditional appointments in every measurable category. In doing so, he will cement the Democratic approach to judicial selection, begun by Carter and expanded by Clinton, which values diversity over liberal ideology in judicial nominees.

Judicial Behavior

While the current analysis confines itself to the selection of federal judges, we can look to their decision-making behavior once appointed to support the argument that Republican presidents' appointees have been more conservative than Democratic presidents' appointees have been liberal. Fortunately, a wealth of recent scholarship has tried to tackle this very issue. Though these works have largely focused on the judicial behavior of the most recent presidents' judges (Clinton and W. Bush), they inevitably contain some analysis of the earlier presidents included in my period of study. Due to the greater difficulty to evaluating the decisions of appellate courts empirically, these studies primarily consider only district court judges. As district court judges constitute the majority of cases considered in my own analysis, however, these works feature a great degree of applicability to the questions considered in this paper.

Republican-appointed judges, consistent with the approach described above, have proven staunchly conservative, a phenomenon that has only grown over time. The sixth edition of *Judicial Process in America* by Robert Carp, Ronald Stidham, and Kenneth Manning features a comprehensive summary of judicial behavior by president. The authors point out that of the presidents in their period of study, which dates back to the Wilson Administration, the appointees of Presidents Reagan and H.W. Bush have been

the most conservative, voting in a liberal direction in 35% and 37% of all cases, respectively (Carp et al. 2004, 160). Looking to the most recent Republican president, the authors' first-term review of the voting behavior of W. Bush's appointees indicated that his judges had the potential to be the most conservative on record (2004, 112). Their later 2009 review of Bush's full selection record upheld this expectation, with his judges voting in a liberal direction only 32% of the time (Carp et al. 2009, 316).

But while Republican presidents' judicial appointees have grown more conservative over time, we cannot say that Democratic presidents' judicial appointees have grown more liberal. Carp. et al. identify President Carter's judges as having amongst the most liberal voting records, their 50% liberal voting incidence a close second only to President Johnson's 51% (2009, 316). This figure fully supports my line of argument, as even the most liberal judicial cohort of the presidents considered (Carter's) votes in a liberal direction in only half of all cases, whereas the most conservative judicial cohort (W. Bush's) votes in a conservative direction in over two-thirds of all cases. When we consider the voting behavior of Clinton's judges, the distinction becomes even more pronounced. Carp et al.'s 2000 study of Clinton appointees found them to vote in a liberal direction in only 44% of all cases (284). Amazingly, this figure places him closer to Presidents Ford (43%) and Nixon (39%) than Carter (50%). Furthermore, Carp et al. note that Clinton's voting record places him closer to the average Republican liberalism score of 39% than the average Democratic liberalism score of 52%, leading them to conclude that "'Moderate' is truly the best word to characterize the voting behavior of Clinton's district court appointees" (288).

An attempt to capture the voting behavior of appellate court judges by Susan Haire, Martha Humphries, and Donald Songer comes to the same conclusion. Of the three issue areas defined in their study, Haire et al. find the Clinton judges' liberalism scores on criminal and labor/economic issues (19% and 48%, respectively) to be roughly equivalent to those of Presidents Reagan (18%, 47%) and H.W. Bush (14%, 44%) (2001, 279). Even in the issue area of greatest disparity, civil rights, Clinton's appellate judges voted in a liberal direction only 37% of the time, compared to Reagan's 20% and Bush's 31% (Ibid.) On every level, then, we can observe that the selection-period opinions of Clinton's judges as moderate and Republican judges as conservative are borne out in the ultimate voting behavior of those appointees.

All of these investigations into judicial voting behavior reflect the fundamentally different approaches Republican and Democratic presidents have taken to the judiciary. Based on the descriptions of each side's differing values in the selection process, it is unsurprising that the behavioral results appear the way they do. In their book, Carp et al. cut to the heart of the issue with their discussion of the factors that determine whether a president can establish a judiciary sympathetic to his views:

> One key aspect of the success of chief executives in appointing a federal judiciary that mirrors their own political beliefs is the depth of their commitment to do so. Some presidents may be content merely to fill the federal bench with party loyalists and pay little attention to their nominees' specific ideologies. (152)

Republican presidents since Reagan have shown a clear commitment to ideologically-based appointments, while Democrats since Carter have shown a greater interest in appointing a diverse array of federal judges. The scholarship on voting behavior reflects

those different value systems in the incidence of liberal voting on the federal bench. While there is yet not enough data to evaluate the behavior of Obama's appointees to the federal bench, based on all initial evidence their voting behavior will likely fall within the moderate liberal trend established by Carter and Clinton.

Vining et al.: Comparing Apples and Oranges

In appreciating the nuances of the different approaches to judicial selection adopted by the Republican and Democratic presidents included in Vining et al.'s period of study, we may better contextualize their findings. While the authors of that piece suggest that their results lead to the inevitable conclusion that the ABA is biased against conservative nominees, an alternate and entirely more reasonable explanation exists. As our brief survey of selection approaches shows, Presidents Reagan, George H.W. Bush, and George W. Bush viewed the judiciary in a fundamentally different way than President Clinton and, by extension, Presidents Carter and Obama. Accordingly, their nominees reflected these fundamentally different approaches.

The Republican presidents' nominees, by all accounts, were strong ideological conservatives. These presidents viewed the judiciary as a potentially powerful tool for implementing their conservative policy preferences, and sought judges that corresponded to those preferences. By contrast, Clinton, the lone Democrat in Vining et al.'s study, selected his nominees not on the basis of their correspondence to any particular political agenda, but rather on the basis of their professional qualifications and likelihood of confirmation. The litany of recent scholarship on the ultimate voting behavior of the presidents' respective judges provides tangible empirical support for these claims.

Thus, in a ratings process sensitive to ideological extremity on either end of the political spectrum, Clinton's nominees are fundamentally different from the Republican nominees. Rather than serve as a definite indicator of any systemic bias on the part of the ABA, Vining et al.'s findings are merely a product of their chosen period of study. By opting for their definitive conclusion that the ABA is biased against conservatives, Vining et al. fail to appreciate the qualitative reality of the situation and ignore the reasonable interpretation that Clinton's nominees were simply more "qualified" than their Republican counterparts when assessed by the ABA's three evaluative criteria.

V. Conclusion

The quantitative and qualitative arguments presented in this piece place considerable doubt on the findings and interpretations of Vining et al.'s "Bias and the Bar." While the current analysis draws inspiration from this piece, however, it has implications beyond a narrow scholarly focus. The findings in Section III clearly indicate a lack of empirical support for the common claim that the ABA is biased against conservative judicial nominees.

Using better evaluative measures and a larger data set covering a period of two and a half decades, the emphasis on political variables found so significant in Vining et al. disappears. Instead, those variables found to significantly affect success in achieving the highest ABA ratings were almost entirely located within the realm of legal occupational and demographic variables. These findings are consistent with the first empirical work done on the ABA's Standing Committee nearly thirty years ago, showing the ABA has been consistent in the application of its evaluative criteria in the years since. Furthermore, the lone significant political variable, past party activism in district court

appointees, affects members of each party equally. Thus, even to the extent that the ABA does consider political variables, it does not favor one particular political ideology over another. The results of my statistical analysis lend support to the ABA's consistent assertions of objectivity and neutrality in its evaluation of judicial nominees, or, at a minimum, that it does what it says it does.

These findings are contextualized by the history of judicial selection during the last thirty years. An examination of the processes by which different presidents have selected judges reveals two distinct approaches utilized by Republican versus Democratic executives. The Republican approach, begun by Reagan, is one that views the judiciary as a powerful policymaking tool and a way to cement a president's conservative legacy long after he leaves office. This approach brings with it an emphasis on like-minded, conservative judges that closely correspond to the policy preferences of the appointing president. The Democratic approach, begun by Carter, instead emphasizes diversity over any particular liberal ideology. Indeed, this emphasis has only grown over time: Carter's diversity numbers were surpassed only by Clinton, and while Obama's selection record is still in its infancy, he appears poised to far surpass even Clinton based on his early nominations to the bench.

The work that has been done on the judicial behavior of the various presidents' judges supports this line of argument. Whereas Republican-nominated judges have shown a consistently strong conservative predilection, Democrat-appointed judges have been much more moderate in the liberal direction. In other words, the politics surrounding the selection process retain significance with regard to the actual decisions and policies promulgated in the federal court system. Additionally, to the extent that the

ABA values a lack of ideological extremity in judges, it has done a reasonably good job of evaluating the judicial nominees of various presidents.

The greater significance that emerges from this analysis is that the ABA, despite the recent controversy over the objectivity of its ratings, is not an overtly biased organization insofar as its Standing Committee on the Federal Judiciary is concerned. While the empirical model cannot prove conclusively that the ABA is *not* biased against conservative judicial nominees, its lack of hard evidence for such a claim is nonetheless telling. Put simply, if the ABA did, in fact, have a sustained bias against conservatives, it would be highly unlikely to have escaped empirical testing.

The Obama Administration's reintroduction of the ABA to its former role in the pre-selection process has lessened the controversy surrounding the organization. Obama's early preference for diverse, highly qualified nominees over staunch liberals too will likely lessen concern over the ABA's evaluative role. The organization will retain its relevance in the political conversation moving forward, however, as judicial politics have only become more polarized over time. As long as the ABA maintains its heavy involvement in the judicial selection process, its objectivity as a neutral evaluator will remain an issue of high interest. While conservative observers will be unlikely to abandon their concerns regarding the ABA in the foreseeable future, the results of my analysis suggest their fears are largely unfounded.

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